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IN THE

Supreme Court of the United States

October Term, 1981

MARK A. SMITH,
Petitioner

v.

AL OLSON and MARCH FONG EU,
Respondents

Petition for Writ of Certiorari to the Court of Appeals, State of California, Sitting as and Acting for the Supreme Court of California

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QUESTIONS PRESENTED

1. Are § 6830(c) And 6430 Of The California Elections Code Unconstitutional On Their Face For Requiring A Change Of Registration For An Independent Candidate For House Of Representatives, 17 Months Prior To The Election In Which The Candidate Seeks To Compete?

2. After *Democratic Party v. Wisconsin,* Are §§ 6830(c) And 6430 Unconstitutional On Their Face For Imposing On Independents A Different Standard Of Participation Than Independents Impose On Themselves?

3. Are §§6830(c), 6430 And 6401 Unconstitutional On Their Face For Providing Different Standards For Movement Between Different Political Parties And Independents, And For Providing Different Standards For Movement Into The Major Parties, Than Out Of Those Parties?

4. Are §§ 6830(c) And 6430 Unconstitutional As Applied To A Candidate For Election In A New District, Created As A Result Of Reapportionment, And Non-Existent As Of The Deadline Established By These Provisions?

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Petition for Writ of Certiorari to the Court of Appeals, State of California, Sitting as and Acting for the Supreme Court of California

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the Court of Appeals, State of California, sitting as and acting for the Supreme Court of California, to require the inclusion of Petitioner as an independent candidate for House of Representatives by the operative date of 6 August, 1982. The date is important since all independent candidates must have filed by 6 August, to appear on the November ballot. The decision presented for review is a final judgment, which denied all relief to the Petitioner, including the injunction sought here.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257 (3) since the decision presented for review is that of the highest Court of California, and since the case concerns rights guaranteed to the Petitioner by Article I, § 2, of the Constitution of the United States, and by the First and Fourteenth Amendments to the Constitution.

OPINION BELOW

The opinion below is presented in Appendix A. Its operative language consists of one sentence, "The petition for writ of mandate, originally filed in the Supreme Court and transferred to this court for decision, is DENIED." The procedure referred to is one in which emergency matters can be and are transferred to other appellate courts for decision, by direction of the Supreme Court, when it is not in session.

Because the Opinion contains no findings of fact, and no conclusions of law, all of the papers presented to the Court below by the Petitioner and by Respondents have been lodged with the Clerk of Court, respectively as Appendices B and C. There was no hearing; the decision was granted on the papers.

STATUTES INVOLVED

California Elections Code, §§ 6401, 6430 and 6830(c) are set forth in Appendix D, at page 3a. Tangentially related sections of the Code will be quoted as needed in the argument. All will be referred to solely by section numbers.

STATEMENT OF THE CASE

Petitioner Mark A. Smith is a resident of Orange County, California. Respondent Al Olson is the Registrar of Voters for that County, and Respondent March Fong Eu is the Secretary of State of California, and its chief election official.

As a result of the 1980 census, California passed a reapportionment statute which created the new 43rd Congressional District, *inter alia*. That District includes the home of the Petitioner within its boundaries. (There was a previous 43rd Congressional District in California, but located elsewhere, and having no application to these proceedings.) The statutes creating this new district, Code §§ 30030-30032, were signed by the Governor and enrolled into law on 16 September, 1981.

The statute was immediately challenged in court by Republican members of the State Legislature. At the same time, an effort to repeal the statute by referendum was mounted

by the State Republican Chairman, supported by the National Republican Chairman. The referendum effort gathered sufficient signatures to appear on the ballot, but the California Supreme Court ruled that the statute would remain in effect for the 1982 primary and general elections. *Assembly* v. *Deukmejian*, 30 Cal. 3rd. 638, decided 28 January, 1982.

A Writ of Certiorari was sought from this Court to review the decision of the California Supreme Court. It was refused; *Republican National Committee* v. *Burton, et al*, 465 US , No. 81-1641, on 26 April, 1982.

Petitioner Smith had been registered as a Republican. Prior to the decision of this Court, which made the new 43rd District final for the 1982 elections, Petitioner changed his registration to "declined to state," which is the California equivalent of independent.

It was Petitioner's intention to run for the House of Representatives as an independent. Declaration of Candidacy must be filed with the local Registrar of Voters (§ 6830). The earliest date for Declaration in 1982 was 7 June (§ 6833). Nomination Papers (petition forms) must be obtained from the Registrar, and can only be filed between 148 days and 88 days before the election (§ 6833). As an independent candidate and independent voter, Petitioner had no relationship to or participation in the primary election, conducted on 8 June, 1982.

On 7 June, 1982, the Registrar of Voters refused to accept the Declaration of Candidacy of the Petitioner and refused to give him the Nomination Papers, on the grounds that he had been registered as a Republican within 12 months of the primary election.

On or about 10 June, 1982, Petitioner filed his Petition for Writ of Mandate in the California Supreme Court. The decision of the Court of Appeals, on behalf of the Supreme Court, came down on 9 July, 1982. Petitioner now files this Petition for Writ of Certorari.

REASONS FOR GRANTING THE WRIT

The Petitioner advances four grounds why the application of the California disaffiliation statute violates his First Amendment rights of political activity as guaranteed against California statutes by the Fourteenth Amendment.

The first argument is that the statute is unconstitutional on its face for barring political freedom of activity for a House candidate seventeen months before the next Congressional election. The second is that the statute compels independents as a group to function contrary to their beliefs. The third argument is that the statute is unconstitutional on its face for discriminating between different political parties, based on their ideology, and the choice of various citizens to belong to one or the other, protecting only certain ones from switches in registration, allowing little or no protection to others. The fourth argument is that the statute is unconstitutional as applied in the present instance since it required the first and essential step in the Petitioner's intended candidacy to be taken prior to the time that the office for which he sought to run even existed. He was required to act before his district had been established. He was required to act before he knew where its boundaries would be.

I. *Sections 6830(c) and 6430 of the California Elections Code are unconstitutional on their face for requiring a change of registration for an independent candidate for House of Representatives, 17 months prior to the election in which the candidate seeks to compete.*

The State of California rests its defense in this case on the first portion of *Storer* v. *Brown*, 415 U.S. 724 (1974) in which the Court found that the "12-month" disqualification in the California Elections Code was constitutional. The Court was acting on the assumption that the California statute was a general one, which prohibited all interparty raiding.

The statute does not do that. It prohibits only certain interparty raiding, by certain parties, against certain others, and

allowing raiding in all other circumstances. The Court apparently was not aware of this aspect of the prohibition when it decided *Storer*, and this feature is discussed fully in the third section, at p.14, *post*.

As its pleadings below demonstrate, California assumed that *Storer v. Brown*, 415 US 724 (1974) applied and was controlling. For a number of reasons, this assumption may not be correct.

The first reason is that this Court throughout *Storer* referred to the predecessor of this statute either as a "12 month" disqualification, or a "one year" disqualification. If this were so, then the disqualification here would be only marginally different from the eight and 11 month disqualifications of voters, upheld in *Rosario v. Rockefeller*, 410 US 752 (1973). But the disqualification in *Rosario* ran from the date the voter had to change his registration, to the date of the two primaries in which he sought to participate. In the instant case, the candidate seeks to participate in the general election (having no connection with the primary), but the deadline dates back from the primary, making the total bar to participation 17 months, rather than 12 months.

The other case important to the Court's decision in *Storer*, was *Kusper v. Pontikes*, 414 US 51 (1973). In that case, there was a 23-month gap between the required change of registration and the election in which the voter sought to participate. This was held to be unconstitutionally restrictive. So, in comparing the actual gaps between change of affiliation and target election, *Rosario* upheld gaps of eight and 11 months, *Kusper* struck down a gap of 23 months, and this case concerns 17 months, more than halfway to the unacceptable end of the scale.

This distinction shows at two points in the Court's opinion in *Storer*. At p. 734, the Court said, "Here, a person terminating his affiliation with a political party must wait at least 12 months before he can become a candidate in another party's primary or an independent candidate for public office." This is not a single deadline of 12 months, but two separate deadlines of 12 and 17 months, the latter applying to independents only.

To like effect, the Court said, at p. 736, "It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system."

The second reason why *Storer* may not control the instant case is that in later cases this Court has more fully equated the First Amendment interests of the candidates and of the voters who might support them, holding that a restriction on candidacy is of necessity a restriction on the voters from whom he seeks support. In *Storer* the Court distinguished the two types of rights in a way it may no longer choose to follow, describing the disaffiliation statute as having, "direct impact... on the candidate, and not voters." (*Storer*, at p. 734.)

Two recent cases in particular support the proposition that this Court now views what state law does to a candidate as being of equal importance to and impact on the voters who share the views of that candidate. Both *Illinois State Board of Elections v. Socialist Workers Party*, 440 US 173 (1979) and *Democratic Party v. Wisconsin*, 450 US 107 (1981) suggest that this Court would no longer draw the distinction between the rights of candidates and voters, that it did in *Storer*. The decision in *Anderson v. Celebrezze*, October Term, 1981, No. 81-1635 may also address this point.

The third distinction is that the disaffiliation statute in *Storer* was found valid, "[a]s applied to," the individual plaintiffs, Storer and Frommhagen. (*Storer*, at p. 734.) As discussed below, in a number of respects this statute has a different impact on Petitioner here, than it did on Petitioners in *Storer*.

The fourth distinction is that the analysis by this Court and lower courts of the effect of various provisions of state election laws has become more detailed with respect to the First Amendment rights involved, than in the early cases. A clear example is *Anderson v. Celebrezze, supra*, on which this Court has accepted certiorari. In most of the Anderson cases, including this one, there were "sore-loser" statutes in effect in the states involved. Many of the cases, including *Celebrezze*, involve arguments by the states that other provisions of their codes operated as additions to the "sore-loser" provisions, arguments which were uniformly rejected.

There has never been a question in any case that a state may legitimately restrict a candidate to only one bite at the apple. If he runs and loses in a party primary which nominates for the office in question, he may not then run in any capacity (another party or independent). The California "sore-loser" statute had no application to the Petitioner here, nor did it have any application to the Petitioners in *Storer*. The Court's discussion in *Storer* combines the two provisions of "sore-loser" and disaffiliation together (at pps. 734-6) as if they had similar impact and similar purpose. In the more detailed analysis of later cases, this Court might not make the same equation of effect and interests.

An aspect of state election laws which has not been addressed in any prior cases is the relationship of the restrictions to the office sought by the candidate. There was a serious debate among the Framers of the Constitution whether the direct election of members of the House of Representatives ought to be annual, rather than biennial. (See *The Federalist*, 52, 53.)

The reason for the provision of biennial elections for the House was that this was the area in the federal government where the will of the people would be most easily, frequently and directly expressed. Article I, § 2 of the Constitution was established for that precise purpose. (*The Federalist*, 54.)

Although elections for the House are conducted in November, those elected do not take office until January of the following year. Therefore, when the California deadline of 17 months is applied to a potential candidate for Congress in the next election, he or she must decide only five months into the term of the incumbent, the following points: 1. What kind of record will the incumbent have—strong, weak, or mediocre? 2. What will be the positions of the incumbent in the next 19 months? What will be the positions of his national party in the next 19 months? Will he support or break with his party positions? 3. If it seems possible that the potential candidate will choose to run, should he run in the party he is now associated with, or with another strong party, or with a smaller party, or as an independent?

According to the May, 1982, registration figures from the State of California, 9,992,087 voters are members of parties covered by the disaffiliation statutes, and 1,098,607 are not. (See Appendix E, totals on p.5.) Therefore, 90% of the state's registered voters are compelled to make the kind of predictions, five months into a new Congress, which the most skilled and astute national political observers do not attempt, so early. If those voters do not act at that point, they are totally barred from certain types of candidacies in the next House election.

In *Storer,* the court refers to preventing independent candidacies prompted by "short-range political goals, pique, or personal quarrel." It can be argued that such motivations, being part of human nature, are also a part of politics. For instance, Andrew Jackson's personal irritation with the national banks of the day led in large measure to his election as the first Democratic President, and the formation of that Party.

In a modern context, the personal antagonisms between President Carter and Senator Kennedy were extremely important in the last election, and contributed in some measure to the election of President Reagan.[1]

So, the deadline here in question, though it might act to sanitize independent candidacies, does absolutely nothing to sanitize Republican and Democratic politics. If removing personal issues be a legitimate state interest, it cannot be applied on a discriminatory basis, differently to candidates holding different political views. And major parties in any state would not tolerate a blanket requirement that all candidates declare themselves 17 months in advance.

But even if this is a legitimate means to approach a compelling state interest in some elections, a decision to run for the House five months after the term of the incumbent has begun, cannot be described as "short-range." To the contrary, it is so long-range that it is beyond the realm of political reality.

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[1] Theodore H. White, *America in Search of Itself: The Making of the President, 1956-1980,* New York, 1982.

"Party stability" is the extremely dangerous phrase which is sometimes used to justify restrictions on candidacy. No state has any legitimate, much less compelling, interest in religious stability. Petitioner submits that a proper view of the freedom to associate under the First Amendment also means a freedom to disassociate, and reassociate, as freely in the political area as in the religious one.

An indication that this was the intention of the Framers appears in the First Inaugural Address of Thomas Jefferson, which is sometimes subtitled, "Democracy Defined." In that speech, he defined the essential elements of the American government, including these words, "Equal and exact justice to all men whatever state or persuasion, religious or political. . ." and, "a jealous care of the right of election by the people."

Jefferson delivered that speech in an effort to heal the wounds of a bitterly contested election contest between his political party, the Republican-Democrats, and the Federalists. In his speech he refers to his party as the "Republicans." In annual dinners, the present Democratic Party refers to Jefferson as a Democrat.

But as a matter of historical accuracy, Jefferson was the first and only Presidential candidate of the Republican-Democratic Party, formed a matter of months before the election by former adherents of the Anti-Federalist Party. The Anti-Federalists had been the other major party in the prior election. Had the California Elections Code at issue here been applicable to Thomas Jefferson in 1801, he could neither have run, nor been elected, to the Presidency.

There is an extensive section on the history of American elections in the *amicus curiae* brief of the American Civil Liberties Union on behalf of John Anderson. That information will not be repeated here.[2] Suffice to say, the process by which five political parties grew strong enough to elect Presidents,[3] and many more (such as the Grange and the Populists) grew strong enough to elect Governors, State legislators, and other

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[2] ACLU *Amicus* Brief for Anderson, *Appendix*, esp. pps. 2a-6a.

[3] Brief for Anderson, p. 27 and note 19. *c.f.* McCarthy & Armor, "The Turning Point," *Harvard Political Review*, Vol. VIII, No 1, p. 6, Fall, 1980.

officials, almost always involved the decision of leading members of a previously dominant party to change their affiliations. Those decisions were almost always made within six months of the applicable election, many times as little as three months before the election.[4]

In his First Inaugural Address, Jefferson sought to assure those whose candidates had been defeated, that his administration would not use the agencies of the government itself against his political opposition. "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority must possess their equal rights, which equal laws must protect, and to violate would be oppression."

The California disqualification statute does exactly what Jefferson was condemning. It does so in a fashion which discriminates between citizens as voters, and citizens as candidates. Any voter may leave the major parties and re-register as he chooses up to 28 days before any election. (§ 305.) It is only if that voter intends to be a candidate that his freedom of political action is circumscribed.

The California disaffiliation law allows the major parties to protect their own interests (which are not necessarily the interests of the State), by allowing the voters freedom of choice, but denying it to the candidates. The net effect was the same as the reply of Henry Ford concerning production of Model T Fords, "The people can have any color they want, so long as it is black." This may be a logical purpose for the Republican and Democratic Parties. But it is an illegitimate purpose for the State of California, under the First and Fourteenth Amendments.

II. *After Democratic Party v. Wisconsin, §§6830(c) and 6430 are unconstitutional on their face for imposing on independents a different standard of participation than independents impose on themselves.*

Two recent cases from this Court establish a principle in American election law which does not appear, and was not

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[4] See Notes 2 and 3, *supra*. Also, *Note: Developments—Election Law*, 88 Harvard Law Review 1111 (1975). Also, History of California election laws, Elections Code, Vol. 28c, esp. pps. 1-5, 9-10, 16-21, 25 and 31.

discussed in any prior cases. In *Cousins* v. *Wigoda,* 419 US 477 (1975) the Court determined that the State of Illinois could not impose standards for the election of delegates which were different than those established by the Democratic National Party for itself. This case was followed by *Democratic Party of the United States* v. *Wisconsin,* 450 US 107 (1981), in which this Court invalidated the "open" primary in the State of Wisconsin to the extent that the results of such a primary were binding on the official delegates from that State to the Democratic National Convention.

Both of these cases contain clear holdings that it is not the proper business of a state to use the compulsion of its election laws to require results effecting a political party, which are contrary to the beliefs of that party. The common theme of these cases is that freedom of association under the First Amendment included the right to define, and rely on, the terms under which new voters could associate with that group. In the *Wisconsin* case the Court further noted that any voter could become Democrat simply by declaring himself to be such, and that this was a relatively weak and unenforceable loyalty test. The Court's conclusion was clear, however, that any party's membership qualifications (whatever they might be) could not be legitimately infringed by contrary provisions of the law of any state.

The question now is how the same principal of freedom of association applies to the millions of Americans who are independents. Independents by definition have neither an orthodoxy nor hierarchy. They share only one belief in common, that absence in party structure, and freedom from required party loyalties, are desirable. And their ranks are open with no preconditions, to any and all who choose to share that belief. Independents are, in short, the Quakers of the political world.

In a number of cases, this Court has recognized that independents are entitled to the same First and Fourteenth Amendment protections as any other political group, despite the unique nature of their beliefs, and their lack of a party structure. Among these cases are *Storer v. Brown, supra, McCarthy v. Briscoe,* 429 US 1317 (1976), and to that will

probably be added shortly *Anderson v. Celebrezze, supra.* But so far, the principal of noninterference by a state with the political beliefs of a group has not been applied to a disaffiliation statute.

While it may be true that all political parties, both major and minor ones, seek political stability for themselves, including delays in the capacity of voters to leave one party and join another one, this is not necessarily the state's interest. As discussed below the "political stability" engendered by the California disaffiliation statute inures more to the benefit of some parties than others. But for the moment, assuming that the statute were even-handed there remains the question of whether it may legitimately be applied to independents. Since it is the basic belief of independents that political parties are not the proper way to express political conclusions, and since it is further their view that freedom of political activity should not be circumscribed in any way, this disaffiliation statute may be contrary to the beliefs of independents.

There are 1 million registered "independents" in the State of California. In the Brief for John Anderson, at page 17, his counsel refer to polls that show up to 37% of the electorate now calling themselves independents. That would project to 3.7 million in California.

The gap between personal beliefs and actual registration can be explained by the fact that independents are barred from any participation in primaries in most jurisdictions, including California. Therefore, each voter has a strong incentive, regardless of his personal beliefs, to register either as a Republican or Democrat. (In one-party states or local jurisdictions, the incentive is to register with the dominant party, regardless of the voter's ideology. The reason is that the nominee of that party will usually be the candidate who is elected.) The Court was recognizing such personal incentives when it referred in the *Wisconsin* case to self-declaration as a weak membership test.

Whether there are only 1 million independents, or 3.7 million, in the State of California, either way they are a large group, entitled under the First Amendment to protection of

their freedom of association in accord with their beliefs. And the association of independents includes, logically, the right to enter or leave the group at any time, without restraint.

Although independents cannot have a party, and therefore cannot have party rules, this belief of theirs is clear. Therefore, after *Cousins* and *Wisconsin* a state should not be permitted to impose on independents as a group, views on membership and association which are foreign to them. Otherwise, the state is compelling independents to live by political party rules, yet the whole reason that they are independents is to avoid such rules.

There is another way of viewing the California statute's application to the Petitioner (and all like him). Once a member of any political party has renounced his membership, the state should have no right to reach out on behalf of his former party, and control his behavior after he has left it. This Petitioner had left the Republican party before its primary was conducted, and before he sought to run as an independent. It is clear that no religion can use the power of the state to control the conduct of its apostates. Political freedom being as important as religious freedom, parties also should also possess no state-imposed power over their former members.

Such a determination would not in anyway disturb the "sore-loser" statutes. It is logical to bind a candidate to the consequences of his own choice to participate in a party primary. And once he has done that, it is logical to hold him to the consequences of that decision until after the general election. But such is not the case here.

The case for Petitioner here is stronger than that of Petitioner Anderson, since Anderson had been a Republican candidate for President in the Presidential Preference Primary in Ohio. Anderson simply withdrew before the election. Petitioner here did not file in any Republican primary, therefore did not have to withdraw, nor did he announce any intention to remain a Republican despite his independent candidacy.

III. ***Sections 6830(c) and 6401 are unconstitutional on their face for providing different standards for movement between different political parties and independents, and for providing different standards for movement into the major parties, than out of those parties.***

Even if this Court holds to the general view that a State may prohibit a change of party membership by a potential candidate for the House, 17 months before the election, there remains the question of unequal application of such a law, based on the political beliefs of the different candidates.

In the election year of 1982, California has five political parties which are fully-qualified for the ballot: Democrat, Republican, American Independent, Libertarian, and Peace and Freedom. These are the parties whose members are covered by §6430. The 10 million people so registered are absolutely prohibited since June, 1981, from running for office as independents or as members of any other political group which seeks ballot status by petition.

However, the law does not prohibit an independent, or member of any non-qualified political party, from becoming a member of a major party and being a candidate in it. The law operates like a fish trap in a stream. It allows outsiders to come into the major parties as candidates, but it does not allow insiders to get out.

Section 6401 contains two disaffiliation provisions effecting candidates for partisan office for "qualified" parties. The first provision is that they must have been members of the qualified party in which they seek to run, for three months prior to filing. The second is that they may not have been a member of another qualified party for 12 months.

The effect of these provisions compared to § 6830(c) is as follows: an independent seeking to run as a Republican, must register as a Republican three months before the primary in which he wishes to compete. A Republican seeking to run as an independent must register at least 17 months prior to the general election in which he wishes to compete (12 months prior to the inapplicable primary election). The same differ-

ence of three months against 17 months applies in movements between Republican and Citizens Party, Democrat and La Raza Unida, etc.

Lastly, there are no restrictions on registration for candidates who belong to non-qualified parties but seek to run as independents. They may change their registration to independent, or retain their party registration, as they choose.

Another demonstration of the discriminatory application of the law is that it allows unlimited raiding between and among the independents and non-qualified parties. Petitioner has attempted to obtain an official list of these parties from the Respondent, March Fong Eu. The best information available from Respondent is shown in Appendix F. Eight political bodies are shown.

The official information from Respondent Olson shows 13 non-qualified parties with registered members in Orange County, as opposed to only eight shown statewide by Respondent Eu. Therefore, it is likely that there are more than 13 such parties statewide, but Petitioner cannot find any official state documents which detail the total number of such parties. Appendix E does show the total number of registrants in such parties.

All of the miscellaneous party registrations together total only 25,683 statewide. The disaffection of a single potential candidate from the ranks of any of them is obviously far more harmful to these nascent parties, than the disaffection of a single potential candidate from the ranks of either the Republicans or the Democrats.

Were the California statute genuinely addressed to party stability across the board, it would not permit raiding by any parties on any others. Nor would it have different deadlines, depending on the parties involved. But the law is quite explicit in protecting only some parties. And the largest group of unprotected voters who might be candidates are independents. 10% of the population of California is registered with the euphemism of "declined to state." Any party, on three-months notice, can bring independents into its ranks as candidates. But

no members of qualified parties may leave those ranks to become independents, during an election year.

What the law of California says is that an independent may change his mind and become a Republican, but a Republican cannot change his mind and become an independent.

Such a law clearly keys its application to the personal political beliefs of the candidate. Specifically with regard to the difference between independent and party candidates, such a discrimination has been flatly and clearly unconstitutional since *Storer, supra,* confirmed in all the McCarty litigation of 1976, and further confirmed in the Anderson litigation of 1980.[8]

IV. ***Sections 6830(c) and 6430 are unconstitutional as applied to a candidate for election in a new district, created as a result of reapportionment, and non-existent as of the deadline under these provisions.***

Even if this Court finds §6430 facially constitutional in a Congressional election, and despite the differing treatment of members of different political groups, there remains the unique nature of this particular election.

The new 43rd District in California was not created until after the deadline had run. It was known that California's population had grown, and that it would therefore gain seats in the House. But until the lines were drawn, there was no way for any citizen to know that he would be in a new district.

There is no conceivable interest, compelling or otherwise, which California can advance for requiring this Petitioner to make an essential decision about running for public office before the office for which he might run, and the district in which he would run, had been created.

The bitter fights that occur over reapportionment are concerned primarily with protection of incumbent seats, and charges of favoritism in creating new districts of benefit to one

[8] Notes 2 and 3, *supra.* Also, Armor & Marcus, "The Bloodless Revolution of 1976," 63 ABA *Journal* 1108, August, 1977.

party or another. This political truth was demonstrated one more time by the fact that the Republican National Committee brought to this Court the final challenge to the California reapportionment scheme which created this particular district.

This fact of political life is nothing new. It was more than 150 years ago that Governor Gerry of Massachusetts had his name immortalized in the word, "gerrymander," the label invented for the odd-shaped creature suggested by the outline of a district outside Boston.

The experts are unamimous in their opinion that who lives where, and where the lines are drawn, are major determinants in candidate's chances for election. They may disagree strongly over who gets hurt, or should be hurt. But on the critical importance of reapportionment itself, all agree.

This being so, the first step of any candidate, for any office, must be an appraisal of his chances in his own district. Presumably, any candidate can assess his own strengths and weaknesses. But politics is not an abstract science. It is the art of the possible, and what is possible depends on the district lines.

For any state to require a mandatory decision concerning candidacy before a candidate knows what district includes his home, is a patent absurdity. It is no more than a lottery in which the non-incumbent potential candidate is just a victim. Whatever its fate on facial analysis, this statute, as applied in California's new 43rd District, does not comport with the First and Fourteenth Amendments.

This last question posed by the Petitioner, whether he can be bound by a deadline that passes before his district has been created, applies to more than just reapportionment cases. As the Court is aware from recent decisions, states and local jurisdictions periodically redraw district lines in making changes between the various forms of representation from at-large elections, to multi-member districts, to single-member districts. Whether under the Voting Rights Act of 1982, or on other grounds, citizens who deem themselves harmed by such changes frequently bring litigation. Since disaffiliation statutes are common across the country, and since changes in district lines such as these can occur at any time, not merely subsequent

to the decennial census, the same problem posed here is certain to arise at other times, and not solely for the reason of reapportionment based on population changes.

[Note: In the court below, Petitioner raised the question of whether California could legitimately determine the number of signatures required by an *ad hoc* estimation method, rather than following the statutory command of counting the total district registration, and applying the set percentage. This issue is now moot, and is not advanced in this Petition, for three reasons; by refusing to give Petitioner his Nomination Papers (petition forms), the State made it impossible for Petitioner to gather signatures; second, there is now too little time for signature gathering; and third, the state made clear that its position was a one-time practical action, not to be repeated.]

For all the reasons stated, Petitioner respectively moves this Court to grant its Writ of Certiorari for the review and reversal of the decision below, and order Respondents to place Petitioner's name on the 1982 general election ballot.

Respectfully submitted,

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